Supreme Court, U.S.
FILED
MAR 4 1998
CLERK

No. 97-1256

In The

Supreme Court of the United States

October Term, 1997

SINCLAIR OIL CORPORATION,
a Wyoming corporation,

Petitioner,

vs.

COUNTY OF SANTA BARBARA,
a Political Subdivision of the State of California;
SANTA BARBARA COUNTY BOARD OF SUPERVISORS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

RESPONDENTS' RESTATEMENT OF THE QUESTIONS PRESENTED

1. In a federal question case raising a facial challenge to a land use ordinance under the takings clause, where *Pullman* abstention is found to be appropriate because of unsettled state law and the pendency of the same claims in state court, is abstention foreclosed simply because plaintiff asserted diversity as an additional basis for jurisdiction?

2. Does the existence of diversity jurisdiction excuse a landowner from compliance with this Court's decisions in *Suitam v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S.Ct. 1659 (1997), and *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)?

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JURISDICTION

This Court has jurisdiction over the Petition pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

INTRODUCTION

This case presents a straightforward application of *Pullman*[1] abstention to Petitioner's one ripe federal claim. Petitioner, whose land was rezoned by Respondents, has embarked on a complicated and ultimately unsuccessful attempt to evade the ripeness requirement set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

Petitioner did this by splitting its claims, filing some in state court and some in district court. Petitioner's state court action, which was filed first, is still pending. The court below held that only one of Petitioner's claims is ripe, and as to that claim, the court abstained under *Pullman*.

Petitioner's principal claim here is that abstention is never proper when federal jurisdiction is premised on diversity. This claim is belied by over 50 years of jurisprudence in this and other federal courts, including *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), neither of which is cited in the Petition.

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[1] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

What this Court is really being presented with is outright forum shopping and a veiled invitation to become the ultimate "zoning board of appeals" for the County of Santa Barbara. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J. dissenting). The Petition should be denied.

STATEMENT OF FACTS

Petitioner, a Wyoming corporation, owns a large parcel of undeveloped land in Santa Barbara County, California, commonly known as More Mesa. Pet. App. A-3.[2] Prior to 1993, Petitioner's parcel had been zoned so as to permit construction of 300 homes if certain other conditions were met. Petitioner never sought any development approvals for construction of any homes under the pre-1993 zoning.

In 1993, Respondent County of Santa Barbara (the "County" adopted a Community Plan pursuant to state law;[3] this Community Plan covered More Mesa and a substantial surrounding area in the County. Pet. App. A-3 – A-4. The 1993 Community Plan rezoned Petitioner's land to permit the construction of 70 to 100 homes. Pet. App. E-2 – E-3. In response to Petitioner's complaints that the 1993 Community Plan was based on outdated biological studies, an administrative procedure was created through which Petitioner could submit a new study and

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[2] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. ___."

[3] California Public Resources Code § 21083.3(e).

seek to develop more than 100 homes on More Mesa. Pet. App. A-4, A-12, E-3 – E5. Petitioner has not done so and indeed has taken no steps to seek a development, planning, or building permit for any portion of More Mesa.

Instead, in September of 1993, Petitioner filed a suit in California state court seeking to nullify the 1993 Community Plan as inconsistent with California's Environmental Quality Act and the California Coastal Act. Pet. App. A-4, n.1. The parties stipulated to a change of venue to neighboring Ventura County. As of the filing of this Opposition, Petitioner has not brought the state court matter to trial.[4] Petitioner did not include a claim for damages in the state court lawsuit, although it should have.[5]

Later in 1993, Petitioner filed the instant lawsuit in the district court. This action contains a variety of damages claims, including state law and federal law takings claims and a state law mandamus claim asserting the invalidity of the Community Plan on the grounds that it was wrongly adopted and implemented under state law. Federal jurisdiction was premised in part on diversity. Pet. App. A-4.

On Respondents' motion, the district court dismissed Petitioner's complaint as unripe and, as to the state law mandamus claim, not within the court's jurisdiction. The

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[4] Petitioner can cause the state court matter to be set for a dispositive hearing by filing a notice of hearing. California Code of Civil Procedure §§ 1094, 1994.5.

[5] *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994), *cert. denied*, 513 U.S. 1 (1995).

Ninth Circuit upheld the district court's dismissals for lack of ripeness under state law with respect to the state law claims, and under federal law with respect to the federal claims, with the exception that Petitioner's federal takings claim was found to be ripe to the extent that it alleged that the Community Plan on its face does not substantially advance a legitimate state interest within the meaning of the Fifth Amendment. As to that single ripe claim, the Ninth Circuit directed that the district court retain jurisdiction, but abstain from adjudication of the claim under *Pullman*. Pet. App. A-16.

SUMMARY OF ARGUMENT

Last Term in *Suitam v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S.Ct. 1659 (1997) a regulatory taking case brought under the Fifth and Fourteenth Amendments, this Court explained:

> "There are two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), explained that a plaintiff must demonstrate that she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations,' *id.*, at 186, 105 S.Ct., at 3116, and sought 'compensation through the procedures the State has provided for doing so,' *id.*, at 194, 105 S.Ct., at 3120." 117 S.Ct. at 1664-1665.

Here, Petitioner has done neither, apparently preferring to litigate rather than actually submit a new biological study or an actual development application to the County. The sole and obvious purpose of the structure of Petitioner's complaint is to evade the requirements of *Williamson*.

Undoubtedly recognizing that this Court is unlikely to revisit the ripeness issues discussed above, Petitioner has focused its Petition on the proposition that the mere existence of diversity as an alternative basis for jurisdiction prevents the district court from postponing a decision on the merits of Petitioner's one ripe claim. However, it has been nearly forty years since this Court definitively concluded in *Thibodaux* that a party's invocation of diversity jurisdiction does not bar abstention by the district court in appropriate circumstances. Although Petitioner cites the *companion* case to *Thibodaux*, in which abstention was found improper on different facts, *see County of Alleghany v. Frank Mashuda*, 360 U.S. 185 (1959), Petitioner has failed to address the impact of *Thibodaux* and many related cases on the argument it makes here. As *Thibodaux* and numerous subsequent decisions make perfectly clear, diversity jurisdiction has never been viewed by this Court as a *per se* obstruction to abstention. And other than a perfunctory stab at the prudential reasons underlying the Ninth Circuit's ruling directing abstention here, Petitioner has failed to articulate a convincing argument for abandoning this Court's well-settled position on this issue.

Nor has Petitioner succeeded in manufacturing a conflict between the decision below and *SK Finance SA v. La Plata County Bd. of County Commissioners*, 126 F.3d 1272

(10th Cir. 1997), in which all the state and federal claims presented were dismissed as unripe. Indeed, the decision below is more favorable to Petitioner because the court here directed the district court to retain jurisdiction over the one claim found to be ripe.

Finally, Petitioner has failed to advance any reason for granting review of issues relating to the viability of Petitioner's substantive due process claim, already presented to this Court in the petition for certiorari in *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997), *cert. denied*, 1998 U.S. Lexis 1587 (March 2, 1998). Even if Petitioner's substantive due process claim survived *Macri*, it is clearly unripe under *Williamson*, as the district court held.

REASONS FOR DENYING THE WRIT

A. This Court Has Already Decided That the Mere Existence of Diversity Between Parties Does Not Bar a Court From Abstaining From Review of a Federal Claim

Petitioner bases its argument for review of the Ninth Circuit's abstention order on two decisions from this Court: *Meredith v. Winter Haven*, 320 U.S. 228 (1943), and *County of Alleghany v. Frank Mashuda Co.*, 360 U.S. 185 (1959). In *Meredith*, this Court held that federal courts should not abstain from an exercise of their diversity jurisdiction solely because state law is unclear, uncertain, or difficult to determine. 320 U.S. at 236. In *Mashuda*, the Court relied upon *Meredith* to reverse a district court's dismissal of a litigant's challenge to a local government's exercise of its eminent domain power. 360 U.S. at 192.

According to Petitioner, *nothing* more is required to show that the Ninth Circuit erred in directing the district court to abstain, because the very existence of diversity between Petitioner and the County is incompatible with the notion of abstention. Even were mere correction of a ruling of the court of appeals a basis for *certiorari*, however, Petitioner is simply wrong in asserting that abstention is never proper in a diversity case. In *Thibodaux*, a companion case to *Mashuda*, this Court affirmed an order of the district court staying an eminent domain action removed to federal court to allow the Louisiana courts to determine an unsettled question of state law, *notwithstanding the existence of diversity jurisdiction*. 360 U.S. at 25-26. Distinguishing *Meredith*, the Court observed that:

> "Where the issue touched upon the relationship of City to State, or involved the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality, we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." *Id.* at 28 (citations omitted).

Invoking the prudential concerns addressed in *Pullman*, the Court concluded that the "special and peculiar nature" of the challenge presented and the desire to avoid "needless friction" between state and federal authorities justified the stay imposed by the district court. *Thibodaux*, 360 U.S. at 28. Moreover, the mere "postponement of decision" (rather than dismissal entirely of the case as occurred in *Meredith* and *Mashuda*), adequately protected the right of the power company to adjudication of its

claims, while ensuring proper regard for "the respective competence of the state and federal court systems . . . in a matter close to the political interests of a State." *Id.* at 29.

Thus, where, as in *Thibodaux*, the Court encounters circumstances warranting abstention, abstention will be upheld even where jurisdiction is premised upon diversity between the parties. The Court's rejection of abstention in *Mashuda* did not result from the diversity of the parties; rather, the facts presented in the case simply did not warrant a restraint on the exercise of jurisdiction. For instance, the Court was not presented in *Mashuda* with a question of unsettled state law of constitutional dimension. As the Court explained, "the state law that the District Court was asked to apply is clear and certain. All that was necessary for the District Court to dispose of this case was to determine whether, as a matter of fact, the respondents' property was taken for . . . private use. . . . " *Mashuda*, 360 U.S. at 196. That is not the case here, where the only ripe claim asserted by Petitioner challenges the constitutionality of a county ordinance as yet unreviewed by the state court and unquestionably affected by a complex set of state laws and regulations affecting coastal development in California.[6]

Further, the *Mashuda* Court found compelling support against abstention in the fact that the respondents' claim could not be addressed in the existing state action; rather, upon dismissal from the federal district court, the

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[6] The interplay of these state laws is the basis of Petitioner's state court action. Pet. App. A-4.

respondents would be forced to file "still another lawsuit" in state court to reach the issue raised in the federal action. *Id.* at 196-97. Here, Petitioner filed a state action challenging the 1993 Community Plan *before* it filed this lawsuit and asserted there the same factual basis in this action. If it chooses, Petitioner can submit all of its claims – including its federal claims – for determination by the state court, thereby alleviating any concerns for undue delay.[7]

Finally, as reaffirmed by this Court years later, the district court in *Mashuda* erred by *dismissing* the lawsuit, rather than merely *postponing* adjudication. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). The Ninth Circuit here has directed that the district court should retain jurisdiction and simply issue a stay postponing consideration of the merits of the claim until the state court action is resolved. Pet. App. at A-16 n.6. Thus, Petitioner has not forfeited its chance for federal review of its federal claim.

Notwithstanding Petitioner's assertion to the contrary, numerous courts, including this Court, have enforced these and other prudential concerns in permitting abstention in

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[7] Petitioner claims an entitlement to proceed immediately with its surviving federal claim on the ground that California law is "unduly harsh" on developers. Pet. at 3 n.1. As Petitioner appears to recognize, however, diversity jurisdiction is intended to provide a neutral forum for litigants; it is not intended as an avenue to alter substantive state land use policy that otherwise meets constitutional requirements. Petitioner's accusations reveal that it is forum shopping to evade state policies that it finds distasteful. There is no suggestion in this record that Petitioner has received unequal treatment due to its status as a foreign corporation.

diversity cases.[8] Petitioner has offered no justification to alter this long-standing jurisprudence.[9]

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[8] *See, e.g., Commonwealth of Pennsylvania v. Williams,* 294 U.S. 176 (1935) (directing federal court in a diversity action to relinquish its jurisdiction in favor of state courts in a receivership dispute); *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) (abstention and dismissal warranted where federal diversity action would unduly interfere with state administrative proceedings); *Alabama Pub. Serv. Comm'n v. Southern Rail Co.,* 341 U.S. 341 (1951) (*Burford* abstention applied where unified state regulatory process provided adequate state remedy and issues raised related to local public needs); *United Gas Pipe Line Co. v. Ideal Cement Co.,* 369 U.S. 134 (1962) (*per curiam*) (directing federal court in a diversity action to defer deciding a federal question until an underlying state law question is decided in the state court); *Kaiser Steel Corp. v. W.S. Ranch Co.,* 391 U.S. 593 (1968) (*per curiam*) (failure to abstain in diversity water rights dispute was error); *Reetz v. Bozanich,* 397 U.S. 82 (1970) (ordering *Pullman* abstention in a diversity case involving alleged violations of federal and state law); *Minot v. Eckardt-Minot,* 13 F.3d 590 (2d Cir. 1994) (abstention ordered in diversity tort suit implicating state domestic relations law because claims raised difficult questions of state law posing policy problems of substantial public import); *Nature Conservancy v. Machipongo Club, Inc.,* 579 F.2d 873 (4th Cir.), *cert. denied,* 493 U.S. 1047 (1978); (abstention upheld under *Thibodaux* where claims presented unsettled issues of state law regarding the ownership of beaches and marshes which, if incorrectly decided, might disrupt significant state policies); *Property Cas. Ins. Ltd. v. Central Nat'l Ins. Co. of Omaha,* 936 F.2d 319 (7th Cir. 1991) (remanding diversity case for determination of whether state court proceedings under state insurance regulatory scheme justified abstention under *Burford*); *Continental Cas. Co. v. Robsac Industries,* 947 F.2d 1367 (9th Cir. 1991) (abstention ordered in insurer's diversity declaratory relief action in light of pending duplicative state court proceeding).

[9] Petitioner also appears to argue that, solely because the parties are diverse, the court of appeals erred by dismissing

B. On This Record, This Court Need Not Decide Whether Abstention Was Properly Ordered As To Petitioner's Single Ripe Claim

Petitioner complains that review is warranted here because the Ninth Circuit improperly and routinely applies *Pullman* abstention in land use cases. Pet. at 18. At the same time, it paradoxically decries the Circuit's allegedly inconsistent application of *Pullman*, arguing that "[t]he upshot is chaos." *Id.* at 21. Petitioner appears not to appreciate this Court's direction that abstention is a uniquely fact-bound determination. *See Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Considered in light of this precept, the Ninth Circuit's practice appropriately reflects the normal variation in result yielded by differing circumstances. Notably, Petitioner fails to identify any decision where the Circuit's analysis strayed from the holdings of this Court. Accordingly, there is no reason to grant *certiorari* to review the fact-intensive application of well-settled abstention principles in this case.

Petitioner's state law claims as unripe *under state law*. Pet. 8-10, Pet. App. A-10 – A-13. However, under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the federal courts are to apply state law – including state ripeness principles – in diversity actions founded on questions of state law. And to the extent that the Petitioner is arguing that the Ninth Circuit's state law ripeness determination is wrong, that argument is not worthy of review by this Court. "[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

Nor does Petitioner succeed in undermining the decision below. A principal factor guiding the Ninth Circuit in this case was the character of the claims asserted by Petitioner and the posture of the overall litigation. In the federal complaint, Petitioner asserted five claims, all but one of which were determined by the Ninth Circuit to be unripe for adjudication.[10] In its sole ripe claim, Petitioner asserts that the 1993 Community Plan is facially unconstitutional in that it fails to substantially advance any legitimate state interest.

Notwithstanding the dubious nature of this claim,[11] it is a claim readily susceptible to the principal goal of abstention under *Pullman* – avoidance of an unnecessary constitutional ruling. Because no state court has yet reviewed the ordinance challenged by Petitioner, it is entirely possible that the state court, interpreting the ordinance in light of California's complex web of coastal

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[10] Contrary to the suggestion implicit in Petitioner's third question presented, the court below *did* hold that Petitioner's facial takings claim was ripe to the extent that it asserts that the Community Plan does not substantially advance a legitimate state interest. Pet. App. A-9. The Ninth Circuit held that Petitioner's facial taking claim was unripe only to the extent that it was "premised upon the denial of a property's economically viable use." *Id.* This holding is clearly correct under *Williamson* and does not merit review in this Court.

[11] Petitioner would be required to show that the Community Plan did not substantially advance *any* legitimate state interest, an issue that would require an analysis both of state law applicable to the site (*e.g.*, the California Environmental Quality Act and the California Coastal Act), as well as local plans and ordinances affecting the site. Because such a determination requires intimate familiarity with these local concerns, abstention is particularly appropriate.

land use regulation,[12] will construe the ordinance in a manner that accommodates Petitioner's position, or at least narrow any claimed constitutional defect. Alternatively, the state court could determine that the County lacked substantial evidence to support its rezoning of More Mesa, or that Petitioner is entitled to just compensation for a taking under state law. Petitioner is by no means barred from seeking such damages in the state court action. *See Hensler v. City of Glendale*, 8 Cal.4th 1 (1994), *cert. denied*, 513 U.S. 1184 (1995); *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761 (1997), *cert. denied*, 1998 U.S. Lexis 506 (U.S. January 10, 1998).

Moreover, the complexity of coastal land use regulation in California and, indeed, the very size of More Mesa justifies abstention here. Under *Pullman*, as well as other abstention doctrines, abstention is warranted where the subject matter at issue is one highly "sensitive" to local concerns.[13] *See Pullman*, 312 U.S. at 498. Over the years,

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[12] Petitioner itself has alleged that the Community Plan is inconsistent with the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 *et seq.*, and the California Coastal Act, Cal. Pub. Res. Code § 30000 *et seq.* Pet. App. A-4.

[13] *See, e.g., Burford; Thibodaux*, 360 U.S. at 28 (issues "intimately involved with [the states'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). This Court has stated that "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). The Ninth Circuit's formulation directing *Pullman* abstention when a complaint touches upon a sensitive area of social policy, Pet. App. at A-14, is entirely consistent with this recurring concern.

Pullman's expression of this prudential concern has evolved. As the Court explained in *Colorado River*, "[i]t is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." 424 U.S. at 815. As Petitioner grudgingly acknowledges, local zoning and land use issues are typically perceived by federal courts as highly susceptible to local policy concerns and intricate state regulation.[14] The parcel of land in dispute here is large and adjoins the coast, thereby magnifying already sensitive local concerns as to future development in the area and access to valued coastal resources. Like it or not, Petitioner must accommodate those concerns, within constitutional bounds, and the state courts are the proper forum for their resolution.

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[14] *See, e.g., Ithsmus Landowners Ass'n v. State of Cal.*, 601 F.2d 1087 (9th Cir. 1979) (applying *Pullman* abstention in deference to comprehensive state land use scheme); *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319 (4th Cir.), *cert. denied*, 513 U.S. 870 (1994) (*Burford* abstention upheld in land use case); *Edwards v. Arkansas Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982) (eminent domain proceedings particularly suitable for *Pullman* abstention due to state interest involved); *Fields v. Rockdale County*, 785 F.2d 1558 (11th Cir.), *cert. denied*, 479 U.S. 894 (1986) (abstention ordered in land use planning dispute involving integrated scheme of regulation). Of course, the mere fact that a case involves land use issues does not compel abstention. *See Mashuda*; Pet. at 21 n.12 (and cases cited therein). Whether the state law is clear or unsettled, whether a constitutional ruling can be avoided by determination of the state law issue, and whether a litigant has an available state law remedy are other factors that must be considered as well.

A final factor that weighs heavily in favor of abstention here is the availability of a complete and adequate state remedy in the state court. The existence of an adequate state court remedy, particularly one already underway, has been repeatedly held to favor abstention.[15]

Under virtually any analysis, abstention was properly ordered here, and review is unnecessary to rectify the Ninth Circuit's application of *Pullman*. This case simply does not present any of the difficult questions that might enhance this Court's previous discussions of the abstention doctrines.

C. There is No Conflict Between the Ninth Circuit's Ruling Below and the Tenth Circuit's Decision in *SK Finance*

Petitioner claims an inter-circuit conflict arising between the Ninth Circuit's decision below and the Tenth Circuit's decision in *SK Finance SA v. La Plata County Bd. of County Commissioners*, 126 F.3d 1272 (10th Cir. 1997), based upon the following question posed by the Tenth Circuit: "Can a federal district court with diversity jurisdiction consider an inverse condemnation claim arising from the Colorado Constitution and statutes providing a special judicial procedure for condemnation claims?" *Id.*

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[15] *See, e.g., Burford*, 319 U.S. 315 (avoidance of interference with state administrative proceedings); *Askew v. Hargrave*, 401 U.S. 476 (1971) (remanding for consideration of abstention due to pending state court proceeding); *Colorado River*, 424 U.S. 800 (avoidance of duplicative, piecemeal litigation).

at 1276. Petitioner asserts that the Tenth Circuit's affirmative answer to this question creates a conflict warranting this Court's review. Pet. 17.

The Tenth Circuit's answer, however, differs not at all from the Ninth Circuit's answer to the *jurisdictional* question posed there. In both cases, the courts found jurisdiction to exist. *Compare SK Finance*, 126 F.3d at 1276 *with* Pet. App. at A-16 n.6. More importantly, however, both courts found this claim to be unripe and therefore not *justiciable*. *Compare SK Finance*, 126 F.3d at 1277 *with* Pet. App. at A-12-13.[16] Unlike the Tenth Circuit, the Ninth Circuit then considered the further issue – not raised in *SK Finance* – of whether the district court should abstain from consideration of a ripe federal takings claim. Consistent with its determination that jurisdiction did indeed exist, the Ninth Circuit directed the district court to retain jurisdiction pending resolution of the state court proceeding. Pet. App. at A-16 n.6.

In short, Petitioner's asserted conflict arises solely from its own confusion between the assertion of jurisdiction and the postponement of decision ordered by the Ninth Circuit. The latter issue is not even addressed in *SK Finance*.[17]

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[16] Notably, the court in *SK Finance* found that the state claim asserted there was unripe under state law, just as the court below did in this case. 126 F.3d at 1278-1279.

[17] Petitioner has also attempted to bootstrap its Petition to another case it characterizes as pending before the Court, Pet. at 17, n.11, but which was decided on December 15, 1997. *See City of Chicago v. International College of Surgeons*, ___ U.S. ___, 118 S.Ct. 523 (1997). The decision in *City of Chicago*, however, is only

D. There Is No Need to Grant Certiorari In This Case In Order to Determine Whether *Armendariz* and *Macri* Were Properly Decided

In another attempt to avoid the *Williamson* ripeness requirements, Petitioner brought a substantive due process claim based on the same factual basis as its taking claim. Pet. App. A-6, A-9. This tactic is unavailing under *Williamson* itself.

In *Williamson*, a landowner brought a takings action against a local county which had decreased the number of allowable housing units that the developer could build on its parcel. One of the developer's arguments was that the county's actions violated due process, entitling the developer to invalidation of the county's actions and to damages. This Court rejected the landowner's argument:

> "We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a 'taking' for which just compensation must be paid, does not resolve the difficult problem of how to define 'too far,' that is, how to distinguish the point at which regulation

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tangentially related to the issues posed here. In *City of Chicago*, the Court reversed the Seventh Circuit's holding that it lacked jurisdiction to consider a challenge to the City's denial of the plaintiff's application to redevelop two historic buildings. *Id.* at 530. The Court then remanded the case to the court of appeal to determine whether abstention might be appropriate to *defer* the exercise of that jurisdiction under *Quackenbush*. *Id.* at 534. Nothing in *City of Chicago* suggests that review is warranted here.

> becomes so onerous that it has the same effect as an appropriation of property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect of the [defendant's] application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply for variances from the regulations." 473 U.S. at 199-200 [fn. omitted].

See also Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 879 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988) (rejecting landowner's attempt to "recast" a takings claim into a substantive due process claim in order to avoid resorting to state remedies).

Under *Williamson* and *Lake Nacimiento*, Petitioner's substantive due process claim was not ripe for adjudication, and the district court correctly so held. Pet. App. A-4. The Ninth Circuit went beyond this holding and decided that Petitioner's substantive due process claim "no longer states a valid cause of action," based on *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (*en banc*). Pet. App. A-9 – A-10. Before discussing *Armendariz* and its companion case *Macri v. King County, supra*, it is important to note that, even without application of *Armendariz* or *Macri*, Petitioner's substantive due process claim was properly dismissed as unripe by the district court.

Armendariz arose out of local efforts to abate housing code violations. Plaintiffs in *Armendariz* challenged local housing code enforcement "sweeps" as violative of substantive due process and equal protection. Relying on *Graham v. Connor,* 490 U.S. 386 (1989), the Ninth Circuit held that:

> "Because the conduct that the plaintiffs allege is the type of governmental action that the Fourth and Fifth Amendments regulate, *Graham* precludes their substantive due process claim." 75 F.3d at 1324.

Macri arose from a local government's denial of an application for a preliminary plat. Plaintiffs brought suit under the Fifth and Fourteenth Amendments and included a substantive due process claim. The *Macri* court was cognizant of the procedural trick that the plaintiffs there, and here, used to avoid the *Williamson* ripeness doctrine:

> "A second concern we addressed in *Armendariz,* which was also a concern for Appellants in this case, was a loophole in takings law regarding the ripeness doctrine. Namely, by presenting essentially a takings claim under the claim of substantive due process, plaintiffs were able to avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). It is axiomatic that a takings violation is not complete until the plaintiff has sought compensation through state remedies and been denied, whereas a substantive due process violation is complete as soon as the government action occurs." *Id.*

Relying on *Armendariz* and *Graham*, the Ninth Circuit held that the plaintiff's substantive due process claim "has no place in this context." *Macri*, 110 F.3d at 1500. This Court denied *certiorari* on March 2, 1998.

The results in *Armendariz* and *Macri* were correct and there is no need to revisit them here. And, as noted above, even if *Macri* did not apply, Petitioner's substantive due process claim would still be unripe under *Williamson*.

The cases relied on by Petitioner do not compel a contrary result nor create an inter-circuit conflict on this issue. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the plaintiff sought a zoning change in order to sell a parcel of land to McDonald's for a fast-food restaurant. The zoning change was denied, and the plaintiff brought a § 1983 action based on alleged violations of substantive due process and equal protection. The Sixth Circuit upheld a judgment adverse to the plaintiff, indicating that, at least in the case before it, there was no need to impose a federal remedy onto state land use decisionmaking. Similarly, in *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989), the Second Circuit reversed a district court judgment for a developer. The developer had sought and been denied a building permit and brought suit on a substantive due process theory. The Second Circuit held as a matter of law that the developer did not have a property interest in the building permit it sought, *id.* at 919, a ruling that by no means supports Petitioner's proposition that a substantive due process remedy is necessary to vindicate federal rights. Finally, *Condor Corporation v. City of St. Paul*, 912 F.2d 215 (8th Cir.

1990) involved an application for a conditional use permit to operate a heliport. The Eighth Circuit affirmed summary judgment for the defendant city on all asserted federal claims, including substantive due process, and remanded for consideration of the plaintiff's pendent state claims involving the application of state zoning laws. This result too does not support Petitioner's claimed need for a substantive due process remedy in the land use area.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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